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JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~908~~ 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. ~~916~~ 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. ~~924~~ 60

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION OF RAILROAD APPELLEES TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 908

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 916

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 924

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION OF RAILROAD APPELLEES TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, the appellees listed in the Appendix hereto move that this Court affirm the final judgment of the District Court on the ground that the judgment is so clearly correct that plenary review by this Court is not warranted.[1]

1. In *New York Central Railroad Company* v. *United States, et al.*, No. 909, the New York Central has appealed from another aspect of the judgment of the District Court—its affirmance of the validity of a Commission rule not brought into question in these appeals. The appellees who join in this motion have not appealed from that separate aspect of the District Court's judgment.

Questions Presented

In addition to the questions set forth by appellants, these appeals raise this further question:

Whether the action of the Interstate Commerce Commission should be sustained on the basis of findings of fact and conclusions of law not relied on in the Commission's opinion.

Statement

While the facts are adequately stated in the opinion of the District Court, it may be worthwhile emphasizing certain considerations that are particularly relevant to the question whether this litigation should be terminated now.

The existing pattern of railroad trailer-on-flatcar (TOFC) transportation was developed at the explicit command of the Commission based on the Commission's construction of the requirements of the Interstate Commerce Act. That pattern permits only shippers to utilize rail "open tariffs." Railroads and motor carriers coordinate their services under voluntary through route arrangements as connecting carriers.[2] In 1954, the Commission established legal guidelines for the development of TOFC in order "to enable carriers and shippers interested in undertaking or using this type of service to proceed with a degree of assurance as to the fundamental legal principles pertaining thereto." *Movement of Highway Trailers by Rail* (the *New Haven* case), 293 I.C.C. 93, 111. In *New Haven*, the Commission, relying upon a long line of decisions beginning with the 1939 holding in *Substituted Freight Service*, 232 I.C.C. 683,[3] held that it would be "repugnant to the Act"

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2. There are hundreds of such through route arrangements in existence. See, in Ex Parte 230: General Summary of Piggyback Questionnaires; Examiners' Recommended Report, App. IV; and 322 I.C.C. 301, 306-307.

3. See also *Greer Broker Application*, 23 M.C.C. 417 (1940); *Stone's Express, Inc. Common Carrier Application*, 32 M.C.C. 525

for motor carriers to use, as shippers, the railroads' so-called TOFC "open tariffs" (p. 105). But in the case at bar, ten years and millions of dollars of railroad investment later, and despite what everyone concedes to have been a rapid growth of piggyback, the Commission seeks to discard *New Haven* and its antecedents by empowering motor and water carriers to "utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier" (Rule 3(a)). It is this about-face by the Commission that has produced this litigation.

The Commission's action represents not merely a radical departure from precedent; it also accomplishes by administrative fiat the very purpose that the Administration had unsuccessfully sought to achieve by legislation shortly before the Commission's decision. Thus, in 1962 and 1963 the Administration proposed an amendment to section 2 of the Act that would have placed the railroads under the same obligations now imposed by the rules.[4] The hearings, however, produced virtually no support for the proposal from either shipper or motor or water carrier representatives, and it died in committee.[5] Moreover, the Commission in

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(1942); *Ringsby Trucklines, Inc.* v. *Atchison, T. & S.F. Ry. Co.*, 263 I.C.C. 139 (1945); *Savage Application*, 265 I.C.C. 157 (1947); *Peninsula Truck Lines, Inc.* v. *Puget Sound Nav. Co.*, 292 I.C.C. 157, 164 (1954).

4. H.R. Doc. No. 384, 87th Cong., 2nd Sess. The proposed legislation would have amended section 2 of the Act by adding the following: "Common carriers subject to the provisions of this part shall not unjustly discriminate as to service or rates in the transportation of loaded or empty vehicles or shipping containers tendered for transportation by any shipper or carrier, whether or not regulated." S. 3242, H.R. 11584, 87th Cong., 2nd Sess; S. 1062, H.R. 4701, 88th Cong., 1st Sess.

5. See Hearings on bills described in note 4, *supra*, before Senate and House Commerce Committees in 1962 and 1963, and H.R. Report No. 1144, 88th Cong., 2nd Sess. pp. 6-8.

1961, 1962, and 1963 recommended to the Congress that it be given the authority to compel the establishment of through routes between railroads and motor carriers, but to no avail.[6]

Even though all of these legislative proposals failed, the Commission nonetheless undertook to reverse the "fundamental legal principles" it had set forth in *New Haven* for the "assurance" of the industry. Thus, the Government's assertion that the District Court's decision "curtails the Commission's regulatory authority radically" (J.S. p. 6) speaks to an assumed authority that the Commission for decades has disclaimed and that the Congress, though asked, has been unwilling to bestow. In these circumstances, we suggest that the decision of the District Court, which basically does no more than to reassert the principles asserted by the Commission itself in the *New Haven* case and to permit TOFC service to continue to develop in accordance with those principles, is both just and presumptively correct.[7] We show below that nothing in the jurisdictional statements detracts from that presumption.

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6. See the Commission's 77th Annual Report (1963) p. 19; 76th Annual Report (1962), p. 201; and 75th Annual Report, (1961), p. 186. Bills to amend the Act in this manner were introduced but were not passed. S. 3510 and H.R. 12362, 87th Congress, and S. 676 and H.R. 2088, 88th Congress.

7. For a comprehensive analysis of the legal issues see Note, "Piggyback" Service Under the Interstate Commerce Act, 66 Colum. L. Rev. 318 (1966). The author's conclusion was: "The District Court clearly seems correct in holding that the Commission's open-tariff rules are inconsistent with the Interstate Commerce Act," and that the Commission evidently "was attempting to create by fiat a power which Congress has thus far refused to grant —that of compelling establishment of rail-motor through routes." *Id.*, at 334.

ARGUMENT

These appeals present no question warranting plenary consideration by this Court. They involve only the District Court's refusal, based on well settled principles, to permit the Commission to expand its authority beyond the boundaries marked by twenty-five years of Commission and court decisions. We show below, first, that motor carriers are without statutory authority to use the TOFC "open tariffs" of railroads and that the rules in issue are incompatible with the through route-joint rate provision of Part II of the Act; second, that the railroads' refusal to permit the motor carriers the use of "open tariffs" does not contravene the statute; and, finally, that the policy contentions newly advanced by the Government do not impair the validity of the lower court's judgment.[8]

1. The District Court Correctly Concluded That Motor Carriers Must Perform Their Authorized Service By Operating Motor Vehicles Upon The Public Highways and Not By Shipping Their Trailers By Rail.

An unexceptionable method of providing coordinated motor-rail TOFC service is through the medium of through routes and joint rates. However, under section 216(c) of

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8. We do not in this motion discuss another independent ground upon which the District Court rested its judgment—that the rules are invalid because, contrary to section 410(c) of the Act, 49 U.S.C. 1010(c), they permit motor carriers to act as freight forwarders. This issue is thoroughly discussed in the motion to affirm filed by the freight forwarders.

While the Commission's rules apply both to motor and to water common and contract carriers, as American Trucking Associations has observed in its Jurisdictional Statement (p. 8 n. 3) the governing legal principles are substantially the same whether motor or water carriers are involved. In consequence, for convenience we refer in this motion only to motor carriers.

the Act, 49 U.S.C. 316(c), such arrangements between motor carriers and railroads must be voluntary. The District Court concluded, in consequence, that if the motor-rail service that would be performed under the Commission's rules would amount to through routes, the rules would be invalid because they involve compulsion (A.T.A. J.S. App. A, p. 44).[9] The correctness of this view is plain, for it obviously could not be maintained that the railroads would be acting "voluntarily" in permitting motor carriers to employ "open tariff" TOFC service when the railroads' only "option" would be to abandon that service entirely.

No appellant contests this aspect of the District Court's opinion. Rather, all appellants attempt to escape the force of the court's conclusion by asserting that the rules would not involve the establishment of through routes (Govt. J.S., p. 19; A.T.A. J.S., p. 12; N.A.T.A. J.S., p. 15). Putting aside for present purposes the obvious weaknesses in the reasoning advanced to support this assertion,[10] the threshold question is whether, in the absence of valid through route agreements, the motor carriers under the Act possess the authority to utilize the railroads' open tariffs to transport freight that is tendered by shippers to the motor carriers.

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9. The opinion of the District Court, which is reported at 244 F. Supp. 955, is reproduced as Appendix A to the Jurisdictional Statement of the American Trucking Associations. In this motion, we cite to that Appendix.

10. The Government's analysis, for example, seems to amount simply to the contention that there are no through routes where one of the parties does not agree to join in holding out the motor-rail service (J.S. p. 19). As the District Court observed, "By verbal legerdemain, the rule against compulsory through routes thus would be read out of existence, since the logic of the argument carries the conclusion that whenever there is compulsion there is no through route" (A.T.A. J.S. App. A, p. 44).

As to this fundamental issue, the appellants adopt different approaches. The American Trucking Associations asserts that the transportation by railroads of trailers on rail flatcars over rails is not really rail transportation, but rather is a type of transportation that the Associations sometimes characterizes as motor carrier service (p. 12) and sometimes as "neither an exclusive rail service nor an exclusive motor service" (p. 10), with the asserted result in either case being that motor carriers are free to perform TOFC transportation as part of their authorized service. This contention, which is simply an effort to resurrect an argument that was rejected by the Commission in the *New Haven* case, *supra,* requires little discussion. As the Commission held in *New Haven,* 293 I.C.C., at 100-101, it is perfectly clear that, when a railroad transports freight on a rail car over rail tracks, it is performing railroad transportation whether the freight is in a box car, a movable container, or a motor trailer. And, even more to the point, the Commission reaffirmed that holding in this very case.[11]

While the Government evidently is unwilling to adopt the fanciful argument of the American Trucking Associations, it does maintain that, in the absence of a through route, motor carriers are free to act *as shippers* in turning over their shippers' traffic to railroads for TOFC transportation. This contention was properly rejected by the District Court on the basis of the requirements of the Act as they have been interpreted by the Commission and the courts in a long and consistent line of decisions.

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11. "In the *New Haven* case, *supra,* it was found, *properly we think,* that *'trailer-on-flatcar transportation is in fact transportation by railroad,'* and that 'this is so whether the trailers are owned or operated by railroads, shippers, or motor common carriers.'" 322 I.C.C. at 343. (Emphasis supplied.)

First, the plain implication of the through route section is, as the District Court held, that "[T]he through route permitted by Section 216(c) is the exclusive statutory authority for the use of rail transportation . . ." (A.T.A. J.S. App. A, p. 45). The Congress having committed the establishment of joint motor-rail service to the choice of the parties, there is no room for the establishment of such service by compulsion. As this Court stated in *Interstate Commerce Commission* v. *Parker*, 326 U.S. 72: "The Interstate Commerce Act contains no provision by which the Commission may compel non-rail motor carriers to coordinate their road service with rail service or may compel rail carriers to coordinate their service with motor carriers." See also *Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968 (S.D. N.Y. 1940), *aff'd* 309 U.S. 638.

The Government's argument that section 216(c) is not exclusive is that the Congress did not intend to "preclude the Commission from correcting abuses stemming from refusals to cooperate" (J.S. 19). But, inasmuch as the asserted "refusals to cooperate" (as to which there is no evidence in the record) obviously would consist of refusals to enter into through routes, it is clear that this is exactly the power the Congress withheld from the Commission when it denied the Commission the authority to compel motor-rail through routes.

Moreover, entirely apart from the significance of section 216(c), the fundamental structure of the Act evidences the Congressional intent that motor carriers are limited to operating by motor vehicle upon the public highways and may not simply, acting as shippers, arrange for the transportation of freight by rail. The Congress has, in the various parts of the Interstate Commerce Act, subjected the different modes of transportation to a comprehensive pattern of regulation and has defined the type of trans-

portation service to be performed by each. The plain implication is that each mode may act only within the scope of the Congressional grant of authority. Thus, with respect to the case at hand, the motor carriers, in proposing to use rail "open tariffs" to transport freight, must establish that they will be engaged in the service they are authorized to perform as motor carriers. There is no dispute as to this basic principle, nor could there be, since Rule 3 itself indicates that the premise of the rules is that, in hiring the railroads to perform TOFC service, the motor carriers would be engaged "in the performance of all or [a] portion of their authorized service."

But it is clear that, in acting as shippers in tendering freight to railroads, the motor carriers would *not* be performing "their authorized service," since the Congress has empowered motor carriers only to transport freight in motor vehicles and over the public highways. Thus, for example, "common carrier by motor vehicle" is defined as "any person which holds itself out to the general public to engage in . . . transportation by motor vehicle. . . ." 49 U.S.C. 303(a)(14). And "motor vehicle" is defined as any "trailer, or semitrailer . . . used upon the highways . . . but does not include any vehicle . . . operated exclusively on a rail or rails." 49 U.S.C. 303(a)(13).

The District Court, relying upon these and cognate provisions in Part II,[12] as well as upon the general statutory scheme, held:

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12. "The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passen-

"The internal structure of the Interstate Commerce Act itself bears evidence of the limited authority con-

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ger transportation similar to street-railway service." 49 U.S.C. 303(a)(13).

"The term 'common carrier by motor vehicle' means *any person which holds itself out to the general public to engage in the transportation by motor vehicle* in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to chapter 1 of this title." 49 U.S.C. 303(a)(14). (Emphasis supplied.)

"The term 'contract carrier by motor vehicle' means any person which engages in *transportation by motor vehicle* of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) . . ." 49 U.S.C. 303(a)(15). (Emphasis supplied.)

"Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business *by motor vehicle*, in interstate or foreign commerce, *on any public highway* or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property *by motor vehicle* in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person." 49 U.S.C. 303(c). (Emphasis supplied.)

"Except as otherwise provided in this section and in section 210a, no common carrier *by motor vehicle* subject to the provisions of this part shall engage in any interstate or foreign operation *on any public highway*, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. . . ." 49 U.S.C. 206(a)(1). (Emphasis supplied.)

> ferred on the carrier. Each mode of transportation is the subject of a separate formal part of the Act: Part I deals with rail carriers; part II with carriers by motor vehicle; part III with carriers by water; and part IV with freight forwarders. The certificate of public convenience and necessity or license appropriate for each mode of transportation is, by its terms and by the internal logic of the legislation, confined to transportation by that mode. Thus the certificate issued to a motor carrier constitutes a formal determination of the public need for motor transportation, regardless of the availability of other modes, and authorizes the holder to engage in for-hire transportation by 'motor vehicle', not by rail or other modes, and on the 'public highway'.[13] (A.T.A. J.S. App. A, p. 41).

"13. Secs. 203(a)(1) and (c), 206(a)(1), 209(a)(1): 49 U.S.C. §§ 303(a)(1) and (c), 306(a)(1), 309(a)(1)."

This holding of the District Court, as it said, is "supported and confirmed by the consistent and repeated decisions of the Commission and the courts" (A.T.A. J.S. App. A, p. 47). In *Substituted Freight Service*, 232 I.C.C. 683 (1939), the Commission held that a motor carrier could not, acting as a shipper, lawfully substitute rail service for its authorized highway service in the absence of a valid joint rate, because to do so would be "repugnant to the Act" (A.T.A. J.S. App. A, p. 48). In a series of cases from that decision until *Ex Parte 230*, the Commission regularly adhered to this principle.[13]

The District Court found confirmation of these prior holdings of the Commission in a number of court decisions bearing upon the limits of *motor carrier authority*. Thus, the Court stated:

13. See cases cited at note 3, *supra*.

> ". . . [A] person who engages in transporting goods for the general public by using open-tariff service of common carriers is not himself engaged as a common carrier by motor vehicle, so as to be entitled to a certificate of public convenience and necessity under the 'grandfather' provisions of the Act. *Acme Fast Freight, Inc.*, v. *United States*, 30 F. Supp. 968 (D.C.N.Y. 1940), aff'd p.c. 309 U.S. 638; *Ready Truck Lines, Inc.* v. *United States*, 42 F. Supp. 970 (N.D. Ill. 1941), affirmed 314 U.S. 580. *The relevant premise of the decisions is that the authorized service of the common carrier by motor vehicle under the law is transportation over the public highways by motor vehicle, not rail transportation by railroad*" (A.T.A. J.S. App. A, p. 49). (Emphasis supplied.)

The common holding of the decisions cited by the court—as well as of *Andrews Van Lines, Inc.* v. *United States*, 240 F. Supp. 763 (Neb. 1965), *aff'd* 382 U.S. 67; *Moore* v. *United States*, 41 F. Supp. 786 (Minn. 1941), *aff'd* 316 U.S. 642; and *Kline* v. *United States*, 41 F. Supp. 577 (Neb. 1941)—is that a person to whom a shipper tenders freight does not perform the authorized service of a motor carrier when he ships that freight under an open tariff of a common carrier.[14] The Government's motion to affirm (pp. 4-5) in *Andrews Van Lines* correctly stated the law:

> "Section 203(a)(14) of the Act . . . defines 'common carrier by motor vehicle' as 'any person which holds itself out . . . to engage in . . . transportation by motor vehicle,' and Section 203(a)(13) . . . defines a motor vehicle as '. . . any vehicle, machine, tractor, trailer, or semitrailer . . . used upon the highways.' *Plainly*

14. See also *United States* v. *Maher*, 307 U.S. 148, 155-156 (1939) and *Consolidated Freightways* v. *United States*, 136 F.2d 921 (8th Cir. 1943), *cert. den.* 320 U.S. 781, which held that motor carrier authority and service cannot exist apart from identifiable or irregular highway routes over which the service must be performed.

the statute did not intend to treat carriage by ship, plane, or train as carriage by motor vehicle." (Emphasis supplied.)

So far as we can determine, there are no contrary decisions.

Under the rules here at issue the motor carriers would be permitted to perform their authorized motor carrier service in precisely the same fashion as the companies involved in these prior cases—*i.e.*, to hire railroads to transport freight tendered to the motor carriers. However, the decisions cited require the conclusion that the motor carriers, in arranging for this transportation, would not be performing motor carrier service. Therefore, the rules are invalid, for, as we have indicated, no appellant maintains that motor carriers are free to engage in any transportation service other than that of a motor carrier.

In sum, the District Court was plainly correct in holding that, both by virtue of the through route provision and the authorization provisions of the Act, the rules are invalid.

2. No Provision Of The Act Authorizes Rules 2 and 3.

Even if the authorization and through route provisions of the Act did not constitute a bar to the rules, the Commission's action could not be upheld unless the railroads are transgressing the Act in refusing to offer to competing motor carriers the TOFC service that they offer to shippers. The Commission found such a transgression by virtue of the anti-discrimination command of section 2, 49 U.S.C. 2, and the Government urges that the District Court erred in holding that section 2 was inapplicable.

The Government, however, is compelled to admit (p. 13) that sustaining the rules under section 2 requires reading that section's prohibition against rate discrimination as including a prohibition against service discrimination,

though the latter is independently proscribed by section 3(1).[15] For this position the Government offers no authority to offset the plain meaning of the statutory language. Indeed, it does not even assert that the statutory language is not plain.[16]

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15. Section 2 provides:

"*If any common carrier* subject to the provisions of this part *shall,* directly or indirectly, by any special rate, rebate, drawback, or other device, *charge, demand, collect or receive from any person* or persons *a greater or less compensation* for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, *than it charges, demands, collects, or receives from any other person* or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful." (Emphasis supplied.)

Section 3 provides:

"(1) *It shall be unlawful for any common carrier* subject to the provisions of this part *to make, give, or cause any undue or unreasonable preference or advantage* to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, *in any respect whatsoever;* or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." (Emphasis supplied.)

16. The Government's citation of *Smith* v. *Northern Pacific R. Co.*, 1 I.C.C. 208, is clearly inapposite. That case involved no refusal to serve the general public or emigrants with passenger transportation. The complaint was that the railroad ". . . demands and receives from its ordinary passengers more for *the same service* . . ." (p. 212).

The Government says, however, that unless some basis can be found—the Government does not suggest what—for expanding section 2 to cover service discrimination (as well presumably as all other types of discrimination), a "gaping hole" would be opened in the Act. This "gaping hole" would arise, according to the Government, because of the inapplicability here of the section that obviously does cover discrimination in service—section 3, which "has been held to be limited to discrimination between competitors" (J.S. p. 13). But what the Government refers to as a "gaping hole" is simply the result of the unbroken line of decisions holding that section 3(1), the provision expressly directed to service discrimination, is confined to those situations in which there is competition between the favored and the disfavored.[17] What the Government seeks is to circumvent this limitation upon section 3 by constituting section 2 as a vehicle for dealing with the types of practices for which section 3 was expressly designed. And even were this not so, it would not be enough for the Government to point to what it regards as a defect in the statutory pattern; it must demonstrate, as it has not here, that there is some warrant for calling upon the judiciary instead of the legislature to do the patchwork.

Moreover, it should be noted that the District Court held, not only that section 2 is restricted to rate discrimination, but also that in any event neither that provision nor section 3(1) apply to "discrimination" by one carrier against another when the alleged "victim" is transporting a shipper's goods. Thus, the court stated: ". . . Sections 2 and 3 of the Act have never, so far as appears, been interpreted by the Commission or the courts to require one carrier to perform service as a substitute for another carrier, *qua*

17. See, e.g., decisions cited at page 13, note 14, of Government's jurisdictional statement.

carrier, as the Commission's new rules would command." This view of the reach of these provisions, as the court held, is based upon "settled interpretation of the Act by the Commission itself, as well as the courts" (A.T.A. J.S., App. A, p. 50).[18]

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18. The following cases, among others, support the proposition that sections 2 and 3 were "intended to protect shippers, not competing motor carriers." *Eastern Central M. Carriers Ass'n* v. *Baltimore & O. R. Co.*, 314 I.C.C. 5, 50 (1961), *aff'd sub nom. Cooper-Jarrett, Inc.* v. *United States*, 226 F.Supp. 318, 379 U.S. 6; *Atlantic Coast Line R.R. Co.* v. *Southern Rwy. Co.*, 302 I.C.C. 711, 716 (1958); *Chicago, M., St.P. & P. R. R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, 456 (1957), *aff'd*, 182 F.Supp. 81, 366 U.S. 745; *Consolidated Mining & S. Co. of Canada* v. *N. Y. Central R. R. Co.*, 299 I.C.C. 231, 234-235 (1956); *Movement of Highway Trailers by Rail* (the *New Haven* case), 293 I.C.C. 93, 105 (1954); *Kansas City S. Ry. Co.* v. *Kansas City Terminal Ry. Co.*, 211 I.C.C. 291, 296 (1935); *Nicholson Universal S. S. Co.* v. *Pennsylvania R. Co.*, 203 I.C.C. 637, 647 (1934); *Oklahoma-Arkansas Telephone Co.* v. *Southwestern Bell Telephone Co.*, 183 I.C.C. 771, 774 (1932).

The decisions cited by the Government (p. 12) are not to the contrary. Naturally, where a carrier legitimately acts as a shipper in tendering its own goods or equipment to another carrier, the anti-discrimination provisions apply, as was held in *Louisville & Nashville R. R. Co.* v. *United States*, 282 U.S. 740 (1931), and in *Kansas City S. Ry.* v. *United States*, 282 U.S. 760 (1931). The same result obtains where the goods are actually to be used by the carrier to whom they are sent. *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, 225 U.S. 326 (1912). In *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U.S. 144 (1897), the Court merely held that a carrier may not justify a rate discrimination *among shippers* on the ground that, as to the favored shipper, it was matching a low rate of a competing carrier. And, finally, *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.*, 220 U.S. 235 (1911), held that freight forwarders must be afforded the same rates as other shippers; but of course freight forwarders, as distinguished from motor carriers, have always occupied the dual role of shipper *vis a vis* the carriers who perform

Moreover, the court's conclusion is confirmed by the plain meaning of the proviso to section 3(1), under which that section "shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." And, it should be observed, this proviso has a direct bearing upon the proper construction of section 2, for this Court has stated: "[T]he provisions of §§ 2, 3 and 4 of the act being in *pari materia* require harmonious construction and therefore they should not be applied so that one section destroy[s] the others. . . ." *United States* v. *Louisville & N. R. R. Co.*, 235 U.S. 314, 325-326 (1914). As pointed out by Commissioner Webb in dissenting in the case at bar, the construction of section 2 sought by the Government would lead "to this astonishing conclusion: 'discrimination' as between carriers that is expressly permitted under section 3(1) and its counterpart 216(d) [applying to motor carriers], is condemned by section 2" (322 I.C.C. at 393). And, finally, as Commissioner Webb also observed, the view that section 2 was not meant to regulate "discrimination" by one carrier against another is further supported by the existence of section 3(4), 49 U.S.C. 3(4), which proscribes discrimination among carriers but which does *not* apply as between railroads and motor carriers. Thus, where the Congress intended to bar discrimination between carriers it knew how to do so, and it has done so to the extent that it considered such legislation desirable in the public interest.

The Government argues alternatively that it "need not rest with Section 2" (p. 14). This is an attempt to rewrite the Commission's report. That report refers to no other section as a basis for the rules, and Commission and Gov-

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the line haul and carrier *vis a vis* the freight forwarders' customers. See *United States* v. *Chicago Heights Trucking Company*, 310 U.S. 344 (1940); *Chicago, Milwaukee, St.P. & P. R. R. Co.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465 (1949).

ernment counsel in the court below maintained that the rules did rest exclusively upon section 2. See Report, pp. 335-336; D.C. Op., A.T.A. J.S., App. A., pp. 34-35.[19] Accordingly, applying the principle firmly established by this Court in a long line of decisions,[20] the District Court "measure[d] the administrative action solely against the statutory ground invoked by the agency. . . ." *Id.*, at pp. 33-35.

Moreover, the Government's notion that the National Transportation Policy alone can substitute for specific statutory authority is erroneous. *United States* v. *Pennsylvania R. Co.*, 323 U.S. 612 (1945), merely held that, using the Policy as an interpretive aid, specific sections of the Act should be construed to authorize the Commission's order in question. The Court concluded: "These sections provide sufficient authorization for the Commission's order." *Id.*, at 619. Similarly, in both *American Trucking Associations* v. *United States*, 344 U.S. 298 (1954), and *Assigned Car Cases*, 274 U.S. 564 (1927), the Court approved certain rules on the ground that they were necessary in order to prevent violations of various specific provisions of the Act. Thus in all three decisions specific statutory prohibitions—not the National Transportation Policy alone and not "axioms of common carrier regulation" (J.S. p. 15)—were the ultimate authority for the Commission's actions.

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19. See also the Government's brief below, in which counsel urged that "[a] reading of the Commission's report makes clear that it was this Section [section 2] upon which it relied" (p. 15).

20. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962); *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943); *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 197 (1941); *Automatic Canteen Company* v. *FTC*, 346 U.S. 61, 81 (1953); *United States* v. *Chicago, M., St.P. & P. R. Co.*, 294 U.S. 499, 510-511 (1935).

3. The Policy "Findings" Advanced by the Government Do Not Impair the Validity of the District Court's Judgment.

In the preceding portions of this motion, we have dealt with the statutory provisions relevant to the authority of the Commission to promulgate the "open tariff" rules. Even the Government concedes that there is "serious question" respecting the Commission's authority (J.S. 12); but the Government suggests that plenary review is desirable because there is "little doubt of the economic wisdom and desirability of the Commission's rules" (p. 11). The Government's effort to escape the force of the District Court's reasoning by reliance upon the supposed findings respecting the National Transportation Policy should not, however, succeed. In the first place, the Government's assertions respecting the policy justification of the rules are not supported by any findings of the Commission nor by any evidence in the record. And in the second place, these speculations of appellate counsel about the economic desirability of the rules reflect a misapprehension of the requirements of the National Transportation Policy both as a matter of law and as a matter of fact.

a. *Policy "findings" newly advanced by the Government.* The Government states at some length four particular respects in which "the existing piggyback situation is antithetical to the congressional goal of a genuinely coordinated national transportation system" (J.S. 8-11). The quoted material is preceded by the words "as the Commission found." No citation to the Commission's report, however, is provided with respect to the Commission's "findings" concerning these four policy considerations. The reason for this omission is clear: The Commission made no such findings and the record would not have supported them had they in fact been made. Nowhere in the Commission's

report did the Commission find that "unrestricted railroad control over motor carrier participation in piggyback service is inconsistent with economical and efficient service" (J.S. 9). Nor did the Commission find that "railroad domination of piggyback is anticompetitive" or that the ability of the railroads to offer a door-to-door piggyback service while motor carriers cannot is "contrary to 'fair and impartial regulation . . .'" (J.S. 9-10). Nor is there a word in the report to support the contentions that the Commission found that "railroad domination of piggyback is a fertile source of discrimination among motor carriers" (J.S. 10).[21]

Thus, the Government's Jurisdictional Statement presents to this Court what the Government wishes the Commission's report had contained. But, as this Court has repeatedly held, administrative action must be tested solely on the grounds invoked by the agency, and not by "appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168.[22]

b. *Invalidity of the Government's policy arguments.* Had

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21. In the ten pages of the Report (pp. 327-337) dealing with the "open tariff" rules, the only passages discussing the National Transportation Policy consist of a rebuttal of the contention of the railroads that the rules would transgress the Policy by permitting the motor carriers to benefit by the inherent advantages of long haul rail transportation. The Commission concluded by stating: "[I]t seems obvious to us that the inherent advantages of each mode of transportation can be given freest play through the highest degree of coordination, and that encouragement of such coordination is in the public interest." While this doubtless indicates that the Commission thought its rules would promote "coordination," it could hardly be asserted that this single, highly generalized "finding" is merely shorthand for the detailed "findings" set forth in the Government's Jurisdictional Statement.

22. See also decisions cited in note 20, *supra*.

the Commission's Report contained the findings set forth in the Government's Jurisdictional Statement, the lower court litigation naturally would have followed quite a different path, for we would vigorously have attacked the findings as devoid of support in the record—as they are—and as based upon misconceptions of law—as they also are.

The Government asserts that it is "contrary to 'fair and impartial regulation of all modes of transportation' for railroads to be permitted to offer a complete door-to-door piggyback service, using trucks, while motor carriers may not offer the same service, using the rails," and, similarly, that the motor carrier "is at a marked competitive disadvantage vis-a-vis a railroad that offers a complete door-to-door piggyback service" (J.S. pp. 9, 10). It is plain that the "door-to-door" service to which the Government refers is Plan II, under which railroads perform trucking pickup and delivery, since that is the only "door-to-door" TOFC service and also since motor carriers are in a position to perform the trucking segment of piggyback service in connection with the other four plans. Thus, under Plans I and V, the motor carrier performs this service; and under Plans III and IV, where the shipper arranges for the trucking segment of the service, motor carriers are free to solicit that business.

If the Government's generalizations about the competitive damage being inflicted unfairly upon motor carriers are tested against this single fact—that all that is involved is the terminal trucking performed under Plan II by the railroads—the emptiness of the Government's argument becomes evident. In the first place, the record contains no evidence indicating that this terminal trucking performed under Plan II is of any consequence to the economic well being of motor carriers, and it would be surprising if it were. But more important is the fact that this pickup and

delivery service is explicitly sanctioned by section 202(c) of the Act, 49 U.S.C. 302(c), and is therefore obviously consonant with the National Transportation Policy, as this Court said in *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 67 (1945). The Government evidently regards this statutory provision as "anti-competitive"; but surely that is an irrelevant contention when addressed to this Court rather than to the Congress.[23]

The Government also asserts that there may be "discrimination among motor carriers" by virtue of the railroads' right to enter into through routes with motor carriers only where the parties mutually agree (J.S. 10). Once again, the Government supplies no reference to any facts of record indicating there has been discrimination among motor carriers in establishing Plan I or Plan V services. But the more critical deficiency of the Government's contention is that, as in the case of the terminal trucking service question, the alleged "evil" exists by virtue of the decision of the Congress. Section 216(c) of the Act, as we have noted, puts motor-rail through route arrangements on a voluntary basis; and this Court stated in *Parker* both that 216(c) affords the only means of rail-motor coordination and also that arrangements resulting from that provision's

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23. See *American Trucking Associations* v. *United States*, 364 U.S. 1, 15 (1960):

> "Appellees say that these safeguards are no longer needed, because independent trucking is no longer an 'infant industry.' This is an immaterial argument in this forum. We do not condemn the wisdom of the Commission's action. We simply say that the transportation legislation does, and that the pardoning power in this case belongs to Congress."

The cited case involved an attempt by railroads to justify a broader incursion into the motor carrier field on the argument that changed conditions warranted lesser restrictions on rail affiliated motor carriers.

principle of voluntariness are harmonious with the National Transportation Policy. 362 U.S. at 72-73. In view of *Parker*, and indeed in view of the obvious implications of section 216(c), it cannot be said that the existing TOFC arrangements are offensive to the Policy where they have the incidents that the Congress has deliberately permitted.

The Government's remaining policy contention is that the inability of motor carriers to demand the use of rail "open tariffs" is "inconsistent with 'economical and efficient service' because it retards maximum utilization of rail carriage for the long haul" (J.S. p. 9). This argument, which represents a prediction respecting the impact of the "open tariff" rules, is wholly unsupported by the record. Moreover, it is fallacious on its face.

At the outset, it should be noted that under the rules the TOFC plans would have to be directly available to shippers before they could be used by motor carriers. Thus, the rules would not be opening a hitherto unavailable service to the shipping public.

Next, a determination respecting the extent to which motor carriers would utilize TOFC "open tariffs" turns essentially upon a finding as to the circumstances in which it would be to the motor carrier's—not to the shipper's—interest to do so, since under the rules the option whether to employ TOFC is exclusively the motor carrier's. There are many situations in which the motor carrier could use TOFC to its advantage and the railroads' disadvantage.

Between innumerable pairs of points the flow of traffic is unbalanced. Under such circumstances, motor carriers, water carriers, and railroads compete for the traffic and endeavor to handle the traffic with a minimum empty return of equipment. Under Rules 2 and 3, motor and water carriers would be enabled to operate a balanced service

over the road or waterway, tender the unbalanced portion of their traffic to the railroads, and thus cause the railroads' normal empty return problems to be aggravated as its competitors' problems are solved. The railroads' cost of performing TOFC service would be increased in proportion to the increased empty return problem.

In a similar fashion, the railroads' competitors would be enabled to solve their problems due to seasonal peaks in traffic, to winter or other unfavorable weather conditions, to mountainous or other difficult segments of their operations, to the tender of low density or other undesirable freight by shippers, and to many other problems. In each instance TOFC service would be shouldered with the motor carriers' ordinary operating burdens. This might increase the efficiency of the motor carriers but hardly of the TOFC service. "In short, the result . . . would be to protect the motor carrier from a form of competition beneficial to the shipping public while taking the benefits of the competitive struggle from the shipper and donating them to the motor carrier." Note, "Piggyback" Service Under the Interstate Commerce Act, 66 Colum. L. Rev. 318, 335 (1966).

Finally, it should be noted that, if the jurisdictional statements carry any implication that the motor carriers' economic health requires that they be authorized to use the railroads' "open tariff" TOFC service, such an implication would be without foundation. Between 1939 and 1960 the record shows that the railroads' proportion of the intercity freight ton-miles dropped from 62.34% to 43.51%, whereas the motor carriers' proportion increased from 9.72% to 22.50%. Moreover, the motor carriers' share of traffic was the more valuable. Thus in 1959 the total freight revenues of motor carriers reporting to the Interstate Commerce Commission was 80.27% of the total freight, mail and express revenues of all the railroads of the United States,

whereas the total ton-miles of such motor carriers were only 17.40% of the total railroad ton-miles. (Verified Statement 13-A-2, Kroll, Ex. 1, pp. 1, 5.)

CONCLUSION

The judgment of the District Court, insofar as it annulled, and enjoined enforcement of, Rules 2 and 3, should be affirmed.

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APPENDIX

NAMES OF RAILROAD APPELLEES

Western Railroads

The Atchison, Topeka and Santa Fe Railway Company; Chicago & Eastern Illinois Railroad Company; Chicago & North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railway Company; Chicago, Milwaukee, St. Paul & Pacific Railroad Company; The Denver and Rio Grande Western Railroad Company; Great Northern Railway Company; The Kansas City Southern Railway Company; Louisiana & Arkansas Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Northern Pacific Railway Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Soo Line Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; The Western Pacific Railroad Company.

Eastern Railroads

The Baltimore & Ohio Railroad Company; Boston and Maine Company; The Chesapeake & Ohio Railway Company; Erie-Lackawanna Railroad Company; Grand Trunk Western Railroad Company; the New York, New Haven and Hartford Railroad Company; Norfolk and Western Railway Company; The Pennsylvania Railroad Company; Reading Company; Western Maryland Railway.

Southern Railway Company and Affiliates

The Alabama Great Southern Railroad Company; The Cincinnati, New Orleans and Texas Pacific Railway Company; New Orleans and Northeastern Railroad Company; Georgia Southern and Florida Railway Company; Carolina and Northwestern Railway Company.

Southeastern Railroads

Atlanta & West Point Railroad Company; Atlantic Coast Line Railroad Company; Clinchfield Railroad Company; Florida East Coast Railway Company; Georgia Railroad; Gulf, Mobile and Ohio Railroad; Illinois Central Railroad; Louisville and Nashville Railroad Company; Norfolk Southern Railway Company; Seaboard Air Line Railroad Company; The Western Railway of Alabama.